Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM CASTRO,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether under *Reves v. Ernst & Young*, 507 U.S. 170 (1993), an individual must conspire to participate in the operation or management of an enterprise to be convicted under 18 U.S.C. 1962(d) of conspiring to violate 18 U.S.C. 1962(c).

2. Whether individuals who commit predicate acts connected with the same legitimate RICO enterprise may be convicted together under 18 U.S.C. 1962(d) as members of a single conspiracy to violate 18 U.S.C. 1962(c), even though those individuals do not share a common purpose to bring about a single unlawful end or result.

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In The
Supreme Court of the United States
October Term, 1996

WILLIAM CASTRO,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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William Castro respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App. 1a-34a) is reported at 89 F.3d 1443.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1996. A petition for rehearing and suggestion of rehearing en banc was denied by the court of appeals on September 30, 1996. (App. 35a-37a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

§ 1962. Prohibited Activities.

* * * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

STATEMENT

This case arises out of the prosecution of petitioner William Castro and co-defendants Arthur Luongo, Harry Boehme, and Nancy Lechtner, all attorneys who practiced law in the state court system in Florida (hereinafter, collectively, the "Attorneys"). On November 10, 1993, the Attorneys were convicted of a single count of conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), as well as individual counts of bribery and mail fraud, based on an indictment naming the Attorneys, two unindicted co-conspirators and five co-defendants whose trials were severed. The Eleventh Circuit affirmed the convictions. It held that the operation or management requirement established by this Court

in *Reves v. Ernst & Young*, 507 U.S. 170 (1993), governing all prosecutions under 18 U.S.C. 1962(c), was not relevant to a charge of conspiracy to violate that very same provision for convictions under 18 U.S.C. 1962(c). The Eleventh Circuit also held that the Attorneys properly were convicted of a single RICO conspiracy encompassing the severed co-defendants, despite (1) an express finding by the trial court that the acts of the severed co-defendants were unrelated to those of the Attorneys; and (2) the absence of any evidence that the individual acts of bribery by the Attorneys shared a common purpose or were the product of a single agreement.

1. Beginning in 1989, as part of an investigation into the Florida judiciary, a joint task force of state and federal agents procured the services of an attorney named Raymond Takiff to act in an undercover capacity as a "corrupt lawyer" purporting to represent the kingpins of a drug cartel. RV 12, Dkt. 1385 at 223-39. Takiff approached Roy Gelber, a judge of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, and offered him cash in exchange for sensitive information filed under seal in the Circuit Court. RV 12, Dkt. 1385 at 235-39; RV 14, Dkt. 1387 at 12-18.[1] Takiff tape recorded hundreds of hours of conversations with Gelber and other circuit court judges in which they agreed to accept

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[1] From 1987 until he resigned as part of his plea agreement in 1991, Gelber was a judge in the Eleventh Judicial Circuit, the first two years as a county court judge and the last two years as a circuit court judge in the criminal division. RV 12, Dkt. 1385 at 153-56; *id.* at 129-30; Gov't Exh. 407. At all relevant times, the Eleventh Judicial Circuit was one of twenty judicial circuits in the State of Florida. RV 11, Dkt. 1384 at 10. The Eleventh Judicial Circuit comprised the Circuit Court and the County Court (a court of lesser jurisdiction). *Id.*; RV 12, Dkt. 1385 at 153-55. There were 66 judges sitting in the Circuit Court of the Eleventh Judicial Circuit, 20 of whom were assigned to the criminal division. RV 11, Dkt. 1384 at 12.

cash from Takiff in exchange for fixing the outcome of cases and for secretly divulging the name of a confidential informant with the understanding that the informant would likely be murdered. RV 14, Dkt. 1387 at 62-74, 150-51. Gelber also enlisted Takiff's assistance to extort money from an individual living in Panama. RV 12, Dkt. 1385 at 195-99.

Confronted with the evidence against him, Judge Gelber agreed to plead guilty and to cooperate with the task force investigation. RV 12, Dkt. 1385 at 129. In September, 1991, based on this investigation and on Gelber's cooperation, the government secured an indictment against three active state judges (Harvey Shenberg, Alfonso Sepe, and Phillip Davis) and one former state judge (David Goodhart) (hereinafter, collectively, the "Judges"). The indictment charged that the Judges conducted and conspired with each other to conduct the affairs of the Circuit Court of the Eleventh Judicial Circuit through a pattern of racketeering acts, including the aforementioned acts of case-fixing, extortion, and conspiracy to commit murder, in violation of RICO, 18 U.S.C. 1961(c) and 1961(d). RV 1, Dkt. 211.

After the indictment against the Judges was returned, the government sought to implicate the Attorneys for their participation in unrelated schemes to pay Gelber kickbacks in exchange for court appointments to represent indigent criminal defendants. *Id.* The government also sought to implicate another Florida attorney, Arthur Massey ("Massey") in different unrelated schemes to bribe Judges Sepe and Gelber for court appointments.

In May of 1989, Gelber and Madeline Ferguson, his secretary, discussed finding lawyers from whom they could solicit kickbacks in exchange for court appointments to represent indigent criminal defendants. RV 12, Dkt. 1385 at

274; RV 15, Dkt. 1388 at 51; RV 11, Dkt. 1384 at 85.[2] Gelber testified that Ferguson arranged for two of the Lawyers, Luongo and Boehme, to pay a 25 percent kickback on all fees that they received on court appointments from Gelber. RV 12, Dkt. 1385 at 275-77. Because Gelber did not want to have direct contact with Luongo and Boehme, they gave the kickbacks to Ferguson. *Id.* at 275-76. Gelber testified that about a year after he began appointing Luongo and Boehme in exchange for kickbacks, Ferguson recruited Lechtner to participate in a similar 25 percent kickback scheme with Gelber. *Id.* at 280.

Madeline Ferguson was the only government witness, other than Gelber, who testified about the alleged kickback schemes involving Luongo, Boehme, and Lechtner. RV 11, Dkt. 1384 at 83-224; RV 12, Dkt. 1385 at 7-83. Ferguson stated that she approached Luongo, Boehme and Lechtner separately to request the kickbacks and that the lawyers independently agreed to pay Gelber a 25 percent kickback on all fees collected on court appointments given to them by Gelber. RV 12, Dkt. 1385 at 24; RV 11, Dkt. 1384 at 99-103. There was no evidence that Luongo, Boehme, or Lechtner knew about each other's alleged schemes.

Gelber testified that during this same time period, he

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[2] The court appointment system in the Eleventh Judicial Circuit was a system of pure political patronage. RV 13, Dkt. 1386 at 138. Circuit court judges had the unfettered discretion in their courtrooms to decide whom to appoint on a particular case. RV 11, Dkt. 1384 at 17-18. There were no restrictions imposed by law or regulation as to which lawyers a circuit court judge could appoint, nor were there any restrictions on how many court-appointed cases a lawyer could accept. *Id.* at 19-20, 44. It was the common practice for a circuit court judge to allocate court appointments to a select few attorneys. *Id.* at 46-49; RV 13, Dkt. 1386 at 140. For example, one circuit court judge, now a federal district judge, concentrated appointments almost exclusively on one lawyer. RV 13, Dkt. 1386 at 140.

was involved in another, entirely unrelated scheme involving petitioner Castro. RV 13, Dkt. 1386 at 20. Gelber testified that he first discussed the idea of obtaining kickbacks for court appointments with Castro in the fall of 1989, although Castro had received appointments from Gelber prior to this discussion. *Id.* Gelber testified that Castro agreed to pay him 20 percent of the expected fee from a court appointment before Castro received payment from Dade County. *Id.* at 22.[3] Castro represented his court-appointed clients well, and did not over bill for his work. RV 13, Dkt. 145 at 7. According to Gelber, in late 1989 or early 1990, Castro asked Gelber to pass court appointments to Kent Wheeler, a lawyer who shared office space with Castro; Gelber appointed Wheeler to cases in exchange for the same 20 percent kickback. *Id.* at 26. There was no evidence that petitioner was aware that the other 3 attorneys were also bribing Judge Belber, or in fact, that any criminal activity other than that in which he was a direct participant was occurring in the Circuit Court.

Wheeler, who received immunity from prosecution, was the only other government witness who testified about bribes involving Castro. RV 15, Dkt. 1388 at 167-88. Wheeler testified that Castro approached him with the kickback idea around Christmas of 1989. *Id.* at 187. Although Wheeler previously had received court appointments from Gelber, RV 13, Dkt. 1386 at 19-20; RV 15, Dkt. 1388 at 187, he stated that he received his first appointment from Gelber pursuant to the alleged scheme in January 1990. RV 15, Dkt. 1388 at 188. Wheeler testified that Castro delivered Wheeler's payments to

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[3] The Dade County Finance Department paid the bills for court appointments and, in the regular course of business, sent checks to court-appointed attorneys by United States mail. RV 12, Dkt. 1385 at 89-93.

Gelber. *Id.* at 190 Wheeler knew nothing about Luongo, Boehme or Lechtner or the activities of the other Judges.

The only person common to all the bribery schemes, Gelber, testified that all four Attorneys' schemes were "ke[pt] . . . separate." RV 4, Dkt. 839 at 7617. Moreover, according to both Gelber and Ferguson, the schemes involving Luongo, Boehme, and Lechtner were unrelated to the scheme involving petitioner Castro. Gelber stated that he never told Ferguson, his trusted assistant, about the alleged kickback scheme with Castro. RV 15, Dkt. 1388 at 98. Ferguson admitted: "I don't know anything about Mr. Castro." RV 11, Dkt. 1384 at 497. In fact, the government repeatedly argued to the jury that there were two distinct schemes: one involving Luongo, Boehme, and Lechtner; the other involving Castro. RV 19, Dkt. 1392 at 10, 19, 184, 187. There was no evidence that the Attorneys were aware of any of Gelber's past or ongoing criminal activities relating to case-fixing and conspiring to commit murder, nor any evidence that they were involved with the other criminal activities of the Judges. RV 16, Dkt. 1389 at 134, 246; RV 18, Dkt. 1391 at 251-52.[4]

2. Rather than charge the Attorneys and Massey individually, on May 27, 1992, the government superseded the indictment against the judges and charged all nine individuals (the Judges, the Attorneys and Massey) under 18 U.S.C. 1962(d) for conspiring to violate 18 U.S.C. 1962(c). RV 1, Dkt. 211 at 4.

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[4] In fact, the evidence demonstrated that there was no connection among the various schemes. For example, although Gelber openly discussed his criminal acts with government informant Raymond Takiff, Gelber never told Takiff that he also was accepting bribes from the Attorneys. RV 15, Dkt. 1388 at 128-29.

Massey, but not the Attorneys, was charged with a substantive violation of RICO under 18 U.S.C. §1962(c). *Id.* at 24-52. The government charged that there were five separate objects of the reconstituted RICO conspiracy, as follows: (1) that Gelber and the Judges receive payments in exchange for fixing cases and disclosing confidential information, including the name of a government informant on the understanding that the informant would be murdered; (2) that Gelber and two of the Judges (Sepe and Davis) receive payments in exchange for making court appointments; (3) that Massey and the Attorneys receive court appointments in exchange for payments; (4) that Shenberg receive payments in exchange for exerting influence over other judges; and (5) that Goodhart receive payments for acting as an intermediary between Circuit Court judges and those who wanted to pay for influence and information. RV 1, Dkt. 211 at 6-8, 15-16. The *only* element common to *all* these various objects was that they involved the same RICO enterprise, namely, the Circuit Court of the Eleventh Judicial Circuit. *Id.* at 4-5.

The government also charged the Attorneys and Massey with bribery and mail fraud for causing the mailing of their payments for court-appointed representation obtained through bribery. *Id.* at 55-70. The case was assigned to the Honorable Jose A. Gonzalez, Jr.

In June and July, 1992, the Attorneys filed their first round of severance motions, seeking separate trials from each other, from Massey, and from the Judges. RV 1, Dkt. 277; RV 1, Dkt. 348; RV 2, Dkt. 358. The government opposed the motions. The government conceded that "if this case did not include a RICO conspiracy count, the government would be hard pressed to succeed on a properly made severance motion." RV 1, Dkt. 316 at 3. Nevertheless, it argued that joinder was

proper, because all of the alleged schemes related to the same RICO enterprise. *Id.* at 3-4; 9. According to the government, whether the defendants "particpated in or [were] aware of the illegal activities of [their] co-defendants" was "irrelevant," to a RICO conspiracy charge. *Id.* at 9. The district court, however, granted defendants' motions in part, and severed the Judges from the remaining defendants. RV 2, Dkt. 376; RV3, Dkt. 434.

The Judges were tried first. During that trial, Gelber testified on direct examination by the government that the Attorneys' bribery schemes were separate and distinct from one another. RV 4, Dkt. 839 at 7617. Relying in part on this testimony, the Attorneys again moved to sever their trials from each other and from Massey. RV 4, Dkt. 951 at 5; RV 4, Dkt. 1022; RV 4, Dkt. 1040. The also moved to dismiss the conspiracy count on the ground that the indictment failed to allege a single conspiracy. RV 1, Dkt. 357 at 4-12; RV 1, Dkt. 347 at 4-8; RV 1, Dkt. 405 at 3-25; RV3, Dkt. 447 at 1-4. The government opposed these motions as well. It did not dispute that the Attorneys were unaware of each other's alleged illegal acts, but argued that the conspiracy charge nevertheless was proper because each defendant agreed to commit predicate acts that affected the same RICO enterprise -- the Eleventh Judicial Circuit Court. RV 1, Dkt. 316 at 3-9; RV 2, Dkt. 401 at 2; RV 4, Dkt. 1034 at 3; RV 18, Dkt. 1391 at 251. Judge Gonzalez severed the trial of Massey from the Attorneys' trial RV 4, Dkt. 931, but he denied the motions of the Attorneys to be tried separately from each other and denied the motions to dismiss the RICO conspiracy. RV 5, Dkt. 1095.

At trial, the government produced absolutely no evidence that the Attorneys agreed to participate in any conspiracy involving the Judges and crimes of case-fixing,

extortion, and conspiracy to commit murder. RV 18, Dkt. 1391 at 251-52. The district court recognized as much at the charge conference: "[O]bviously, I'm not going to instruct on these -- what are they -- conspiracy to commit murder, attempted extortion and so forth; . . . there's never been any evidence that these Defendants knew anything" about those acts. *Id.* Nor was there any evidence that the Attorneys knew about each other or agreed with each other to accomplish a common goal or purpose. At best, the evidence demonstrated four separate bribery schemes.

Plainly uncomfortable with what was transpiring, the district court nevertheless permitted the government to proceed on its single conspiracy theory, believing that he would have to "get to the Supreme Court" in order to apply to a RICO conspiracy the fundamental principle set forth in *Kotteakos v. United States*, 328 U.S. 750 (1946), that proof of a common plan or purpose is necessary to demonstrate a single conspiracy. RV 18, Dkt. 1391 at 251-52.[5]

On November 10, 1993, the jury returned guilty verdicts on all counts. RV 6, Dkt. 1194. The district court sentenced Castro and Luongo to 37 months imprisonment, Lechtner to 30 months, and Boehme to 24 months. RV 9, Dkt. 1348; RV 9, Dkt. 1349, RV 9, Dkt. 1359; RV 9, Dkt. 1358. The Attorneys filed timely notices of appeal. RV 9, Dkt. 1350; RV 9, Dkt. 1355; RV 9, Dkt. 1356; RV 9, Dkt. 1366.

3. On appeal, the Attorneys argued that the

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[5] In his instructions to the jury, the district court misdefined the RICO enterprise as the Eleventh Judicial Circuit, *id.* at 205, rather than the Circuit Court of the Eleventh Judicial Circuit, as charged in the superseding indictment. RV 1, Dkt. 211 at 4. The government likewise argued at closing to the jury that the Eleventh Judicial Circuit was the RICO enterprise. RV 19, Dkt. 1392 at 35.

evidence failed to establish that they conspired to participate in the operation or management of the RICO enterprise -- defined by the government's argument and the district court's instruction as the Eleventh Judicial Circuit. Appellants' Opening Br. at 50-55; Appellants' Reply at 14-19; *see also* Appellants' Opening Br. at 55-59; Appellants' Reply at 19-21. In addition, they contended that the government failed to prove the existence of the single conspiracy alleged in the indictment, causing prejudicial variance and misjoinder that required reversal of all convictions. Appellants' Opening Br. at 20-50; Appellants' Reply at 1-14.[6]

The Eleventh Circuit affirmed the convictions. It did not reach the issue whether there was sufficient evidence to demonstrate that the Attorneys had conspired to participate in the operation or management of the Eleventh Judicial Circuit. Instead, it "reject[ed]" the Attorneys' "attempt to infuse the *Reves* analysis into this case." App. at 15a. According to the Eleventh Circuit, "the *Reves* operation or management test does not apply to section 1962(d) convictions." *Id.*

A majority of the Eleventh Circuit panel also found that there was no variance or misjoinder. *Id.* at 10a-14a. Two judges held that the government's only burden was to prove that "the conspirators agreed to participate directly or indirectly in

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[6] The Attorneys also argued (1) that the indictment was constructively amended to broaden the possibilities of conviction by substituting the Eleventh Judicial Circuit as the RICO enterprise; (2) that there was insufficient evidence to sustain the bribery convictions; (3) that the mail fraud counts failed to state an offense and that the statute, 18 U.S.C. 1346, is unconstitutionally vague; (4) that prosecutors improperly vouched for the credibility of Gelber; (5) that the district court erred in excluding evidence that Gelber lied about his involvement in a conspiracy to smuggle marijuana; and (6) that the prosecutors made improper closing arguments. Appellants' Opening Br. at 55-118; Appellants' Reply at 21-39.

the affairs of an enterprise through a pattern of racketeering activity." *Id.* at 11a. They relied on inferential evidence that the Attorneys were separately told that they might also receive appointments from Judge Davis. *Id.* at 11a-13a. *See* RV 11 at 107-8; RV 13 at 38.[7] They also relied on evidence that petitioner Castro recruited Wheeler to join his bribery scheme with Gelber. *Id.* at 13.

Judge Barkett joined in the majority opinion as to petitioner Castro, but concluded that the government had failed to prove that Boehme, Lechtner and Luongo participated in a "single overarching conspiracy." Concur. at 1. She stated:

> Nothing suggests that [Boehme, Lechtner and Luongo] were aware of the contours or scope of the conspiracy as alleged in the indictment, or that they would be interested in or benefit from the similar activities of others. To the contrary, they were interested only in profiting from their individual, clearly-defined wrongful acts, and neither benefitted from or was dependent upon the larger conspiracy.

App. at 32a. Judge Barkett concurred in the holding, because she found that the resulting variance between the indictment and the proof did not prejudice Boehme, Lechtner or Luongo. *Id.* at 33a-34a.

According to Judge Barkett, the difference between petitioner Castro and the other three attorneys was Castro's solicitation of Wheeler, which made it possible for the jury to

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[7] Critically, not one of the Attorneys was told nor was there any evidence that Davis was a knowing participant in Gelber's bribery schemes. In fact, the government told the jury in closing argument that there was no evidence that petitioner's appointments from other judges "were obtained corruptly or anything was wrong with these court appointments." RV 19, Dkt. 1392 at 31.

"find that Castro agreed to participate in a conspiracy involving numerous participants to corruptly utilize the Circuit Court." *Id.* at n.4. Judge Barkett did not explain how she could find that petitioner participated in the conspiracy that was charged, having found that three of the four defendants did not conspire with each other, with the Judges and Massey *or* with petitioner. Neither the concurrence nor the majority opinion discussed the district court's finding that the Attorneys had nothing to do with the crimes of murder conspiracy, extortion and case-fixing that were objects of the conspiracy in which they participated.

REASONS FOR GRANTING THE PETITION

The court of appeals has not merely undermined this Court's decision in *Reves v. Ernst & Young*, 507 U.S. 170 (1993), it has left nothing standing. By holding that *Reves* is relevant only to prosecutions for substantive violations of 18 U.S.C. 1962(c), not to prosecutions for conspiracy to violate 18 U.S.C. 1962(c), the court of appeals has fashioned an exception that literally swallows the rule. We can imagine virtually no case involving substantive violation of Section 1962(c) -- except perhaps the rare RICO case involving only a single individual -- where the government or a private litigant cannot secure precisely the same relief through an allegation under Section 1962(d) that defendants *conspired* to violate Section 1962(d). The Eleventh Circuit's impossibly narrow reading of *Reves*, which it supported with decisions from the Second and Seventh Circuits, directly conflicts with decisions from the Third and Ninth Circuits. Review is warranted to resolve this important conflict and to preserve this Court's decision in *Reves*.

The intervention of this Court is also necessary to

resolve a conflict over the proper contours of a RICO conspiracy. The decision below erroneously frees the government in conspiracy prosecutions under 18 U.S.C. 1962(d) from the fundamental constraints imposed by the doctrine of multiple conspiracy set forth in cases such as *Braverman v. United States*, 317 U.S. 49 (1942); *Kotteakos v. United States*, 328 U.S. 750 (1946); and *Blumenthal v. United States*, 332 U.S. 539 (1947). While paying lip service to this line of authority, the court of appeals ruled that individuals who agree -- but not with each other -- to commit predicate acts fortuitously connected with the same legitimate RICO enterprise may be convicted together under 18 U.S.C. 1962(d) as members of a single conspiracy, even though they did not share a common purpose to bring about a single unlawful end or result. The Eleventh Circuit is joined by the Third, Fifth and Seventh Circuits in its belief that a RICO conspiracy is not governed by the multiple conspiracy rule; the First, Sixth and Ninth Circuits disagree.

Standing alone, each of these two questions merits review. Together, the holdings below urgently demand attention. By dispensing with *Reves*, the court of appeals has obliterated the requirement that RICO defendants must have a substantial nexus with the RICO enterprise. By dispensing with the multiple conspiracy doctrine, the court of appeals has abrogated the requirement that co-conspirators agree with each other. What is left bears scant resemblance to a conspiracy or a substantive RICO offense and would permit the government and private civil litigants to join defendants and conspiracies in permutations and combinations that will defeat the best efforts of the courts to guarantee fair and orderly trials. This result is intolerable.

1. Petitioner was convicted under 18 U.S.C.

1962(d), which simply makes it "unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c)" of Section 1962. At the time petitioner and the other Attorneys were indicted, in the Eleventh Circuit it was "not necessary that a RICO defendant participate in the management or operation of the enterprise" to prove a violation of 18 U.S.C. 1962(c).[8] *Bank of America Nat'l Trust & Sav. Ass'n. v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986). At the time, the Eleventh Circuit believed that "[t]he word `conduct' in § 1962(c) simply mean[t] the performance of activities necessary or helpful to the operation of the enterprise." *Id.* (citation omitted).

Taking full advantage of this rule, the government fashioned an indictment in the broadest possible terms to link a wide range of otherwise unrelated acts on the theory that each of those acts was designed to "participate, directly and indirectly, in the conduct of the affairs of the enterprise," RV 1, Dkt. 211 at 5-6, and therefore that the acts constituted a single conspiracy to violate Section 1962(c). In accord with *Touche Ross*, the government never alleged that an object of the conspiracy was to participate in the operation or management of the enterprise.

In *Reves v. Ernst & Young*, 507 U.S. 170 (1993), however, this Court expressly overruled *Touche Ross*. *Id.* at 177-80. The Court rejected the view that "almost any involvement in the affairs of an enterprise would satisfy the

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[8] Section 1962(c) makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce. to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . ." 18 U.S.C. 1962(c).

`conduct or participate' requirement" of §1962(c), holding instead that the word "conduct" requires "some degree of direction and the word `participate' [ ] require[s] some part in that direction. . . ." *Id.* at 177-79. The Court concluded that "`to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs,' § 1962(c), one must *participate in* the operation or management of the enterprise itself." *Id.* at 185 (emphasis supplied).

While petitioner's case was pending in the Eleventh Circuit, an Eleventh Circuit panel held that "the Supreme Court's *Reves* test does not apply to a conviction for RICO conspiracy." *United States v. Starrett*, 55 F.3d 1525, 1547 (11th Cir. 1995) (citing *Napoli v. United States*, 45 F.3d 680, 683-84 (2d Cir. 1995); *United States v. Quintanilla*, 2 F.3d 1469, 1484 (7th Cir. 1993)). Without analysis, the *Starrett* court stated only that "we agree with the Second and Seventh Circuits that the Supreme Court's *Reves* test does not apply to a conviction for RICO conspiracy." *Id.*

Even though the government did not argue to the court of appeals that *Reves* is inapplicable to Section 1962(d), *See* Appellee's Br. at 28-30, the court nevertheless followed *Starrett*, "reject[ing]" what it termed petitioner's "attempt to infuse the *Reves* analysis into this case." App. at 16a. Echoing *Touche Ross*, the panel affirmed the convictions, because there was sufficient evidence "to demonstrate that the appellants `agreed' to *affect* the operation or management" of the enterprise. *Id.* (emphasis supplied).

The Eleventh Circuit's position finds some support in the decisions of the Seventh and Second Circuits. In *Quintanilla*, appellant argued that her conviction under Section 1962(d) for conspiracy to violate Section 1962(c) should have been overturned, because she "had no connection with the

management of that enterprise." *Quintanilla*, 2 F.3d at 1484. The Seventh Circuit rejected this challenge, stating, "*Reves* addressed only the extent of conduct or participation necessary to violate a substantive provision of the statute; the holding in that case did not address the principles of conspiracy law undergirding § 1962(d)." *Id.* at 1485.

However, the issue presented in *Quintanilla* and *Starrett* was not the issue presented here. In each, appellants contended that the government must demonstrate that each of them personally was capable of participating in the operation or management of the enterprise, and, hence, of committing a substantive violation of Section 1962(c). *Starrett*, 55 F.3d at 1547; *Quintanilla*, 2 F.3d at 1485. The Seventh Circuit explained that to impose such a requirement upon the government "`would add an element to RICO conspiracy that Congress did not direct.'" *Id.* (citing *Jones v. Meridian Towers Apartments, Inc.*, 816 F. Supp. 762, 773 (D.D.C. 1993)). *See also Starrett*, *id.* (Following *Quintanilla*); *MCM Partners v. Andrews-Bartlett & Assoc.* 62 F.3d 967, 979-80 (7th Cir. 1995) (same).

By contrast, the issue presented by this Petition is whether conviction for conspiracy to violate Section 1962(c) requires the government to prove that the *object* of the conspiracy was to violate Section 1962(c). Under *Reves*, this means that the government must demonstrate that an element of the conspiratorial agreement was to participate in the operation or management of the enterprise. It does not require a showing that the defendants actually participated in operation or management, only a *plan* to do so.

It is even less clear that the Second Circuit's opinion in *Napoli* addressed this critical issue. In that opinion, the Second Circuit reviewed the convictions of several appellants under

both Section 1962(c) *and* Section 1962(d). *See Napoli v. United States,* 45 F.3d 680, 681-83 (2d Cir. 1995); *see also Napoli v. United States*, 32 F.3d 31 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995). The Second Circuit first held that there was sufficient evidence to demonstrate that all appellants who had been convicted of violating Section 1962(c) participated in the operation or management of the enterprise, a law firm. *Napoli*, 45 F.3d at 683. The court then turned its attention to the lone conspirator, Rella, who had not been convicted of the substantive RICO violation. It simply held that Rella's Section 1962(d) conviction was "unaffected by the *Reves* error." *Id.* at 684. In context, this holding takes on a narrow meaning. Under those facts, it is unlikely that Rella and her co-conspirators did not *plan* to operate or manage the enterprise, since all of her co-conspirators were convicted of actual participation in its management or control.

By contrast, none of the Attorneys was convicted of (or charged with) violating Section 1962(c). Thus, unlike in *Napoli*, there was no finding that petitioner or any of his purported co-conspirators, *see* Part 2, *infra*, participated in the operation or management of the enterprise. [9]

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[9] Furthermore, Second Circuit precedent on this issue is inconsistent. Other opinions from that Circuit suggest that *Reves* does in fact apply to Section 1962(d). *See United States v. Masotto*, 73 F.3d 1233, 1235 & 1237-39 (2d Cir.) (The district court erred in failing to include the *Reves* operation or management language in jury instructions regarding Sections 1962(c) and 1962(d)), *cert. denied*, 117 S. Ct. 54 (1996); *Friedman v. Hartmann*, No. 91 Civ. 1523 (BSJ), 1996 WL 457300 (S.D.N.Y. Aug. 13, 1996) (court declined to "infer an agreement to violate [S]ection 1962(c) from acts which fail to constitute `operation or management' of an enterprise"); *Biofeedtrac, Inc. v. Kolinor Optical Enters. & Consultants, S.R.L.*, 832 F. Supp. 585 (E.D.N.Y. 1993) (same); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320 (E.D.N.Y. 1993) (in approving settlement, court notes that plaintiffs would

The Third and Ninth Circuits, on the other hand, have unambiguously adopted the view that *Reves* applies to prosecutions under Section 1962(d). *See United States v. Antar*, 53 F.3d 568, 580-82 (3d Cir. 1995); *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 789 (9th Cir.), *cert. denied*, 117 S. Ct. 174 (1996); *Pedrina v. Han Kuk Chun*, 97 F.3d 1296, 1300-01 (9th Cir. 1996).[10] In *Antar*, the Third Circuit expressly took issue with the Seventh Circuit's decision in *Quintanilla*. *See Antar*, 53 F.3d at 580 (citing *Quintanilla*, 2 F.3d at 1484). It reasoned that "courts risk eviscerating *Reves* by blanketly approving conspiracy convictions when substantive convictions under [S]ection 1962(c) are unavailable" under *Reves*, 53 F.3d at 581 (citing David B. Smith & Terrence G. Reed, CIVIL RICO § 5.04, at 5-39 (1994)). Relying on the text of Section 1962(d), the Third Circuit noted that liability under Section 1962(d) attaches to one who conspires *to* participate in the operation or mangement of the enterprise. Unless the conspiracy's objects include participation in the operation or management of the enterprise, the defendant "is not conspiring to do something for which he or she could be held liable under the substantive clause of the statute." *Id.* at 581.

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have had to prove that defendants conspired to operate or manage the enterprise to prevail on RICO conspiracy claim).

[10] In *Aetna Casualty Sur. Co. v. P&B Autobody*, 43 F.3d 1546, 1566-67 (1st Cir. 1994), the First Circuit considered an argument that jury instructions defining the phrase "participate in the conduct of an enterprise" for purposes of Sections 1962(c) and 1962(d) were deficient under *Reves*. The First Circuit held that those issues had not been preserved for appeal, but applied the plain error standard. *Id.* at 1567. The court did not suggest that the *Reves* test was inapplicable to Section 1962(d), although it did not directly address the issue. *Id.*

The Ninth Circuit has reached the same conclusion. In *Omnitrition*, the Ninth Circuit first held that a lawyer and his firm could not be liable under Section 1962(c), because the attorney did not participate in the operation or management of the enterprise. 79 F.3d at 789. Turning to Section 1962(d), the court found that plaintiff's evidence did "not establish that he conspired to participate in the operation or management of the enterprise, as prohibited by §1962(c)." *Id.* Likewise, in *Pedrina*, the Ninth Circuit upheld the dismissal of claims under Sections 1962(c) *and* 1962(d), because "the wrongful conduct of which [the defendant was] accused relate[d] not to his management of the alleged RICO enterprise, but rather to his having been controlled by it." 97 F.3d at 1301.[11]

The Court should grant certiorari to resolve the conflict over the application of *Reves* to Section 1962(d). The "critical limitation" on the scope of RICO is not its list of predicate acts, but the nexus between those acts and the operation or management of an enterprise. *Reves*, 507 U.S. at 182-83, (quoting 116 Cong. Rec. at 18940 (comments of Sen. McClellan)). *A fortiori*, if *committing* a pattern of predicate acts cannot, absent a nexus with the operation or management of an enterprise, constitute a RICO offense, neither can a simple *agreement* to commit these same acts. Any other result is illogical.

As the Third Circuit recognized, *Antar*, 53 F.3d at 581,

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[11] The Ninth Circuit took the same position in an unpublished opinion as well, in which a petition for certiorari is currently pending on another issue. *See Pacific Gas & Elec. Co. v. Howard P. Foley Co.*, 79 F.3d 1154 (Table), 1996 WL 102581, at *8 - 9 (9th Cir. Mar. 6, 1996) (Section 1962(d) requires evidence that "the pattern of predicate offenses would be the means by which the conspirators would participate in the operation or management of the enterprise."), *petition for cert. filed*, Oct. 22, 1996.

if there is no requirement that RICO conspirators agree to participate in the operation or management of the enterprise, *Reves* itself becomes little more than a judicial artifact. The facts of *Reves* provides a good illustration. In *Reves*, the Court upheld summary judgment dismissing a claim under Section 1962(c) against Arthur that was named as the RICO enterprise. *See generally Reves*, 507 U.S. at 171-78; *Arthur Young & Co. v. Reves*, 937 F.2d 1310, 1214-21 (8th Cir. 1991), *cert. granted*, 502 U.S. 1090 (1992), aff'd. 507 U.S. 170 (1993). In the course of auditing the cooperative in two consecutive years, three Arthur Young employees worked together and with employees of the cooperative to produce severely deficient audits. *Id.* Under the rule articulated by the Eleventh Circuit and applied to petitioner, plaintiffs could have avoided summary judgment and stated a viable RICO claim by simply naming Arthur Young employees or Arthur Young and the cooperative's employees as defendants in a RICO conspiracy to produce those deficient audits.

The decision to divorce RICO conspiracies from the *Reves* requirement is inconsistent not only with *Reves* itself, but also with precedent from the Eleventh Circuit and elsewhere on the elements of a RICO conspiracy. It has long been the rule that to prove a conspiracy under §1962(d) to violate §1962(c), the government must prove that the object or goal of the conspiracy was to conduct or participate, directly or indirectly, in the conduct of the affairs of the enterprise, as the plain language of the statute requires.[12] It is illogical to imbue this

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[12] *See United States v. Boldin*, 772 F.2d 719, 727 (11th Cir. 1985), *modified on reh'g in part*, 779 F.2d 618 (11th Cir.), *cert. denied*, 475 U.S. 1098 (1986); *United States v. Pepe*, 747 F.2d 632, 659 (11th Cir. 1984); *United States v. Tille*, 729 F.2d 615, 619 (9th Cir.), *cert. denied*, 469 U.S.

same language with one meaning for the purposes of Section 1962(c), *see Reves*, 1169-70, but a different meaning for purposes of Section 1962(d).

The *Reves* requirement provides a substantial check on the ability of the government and civil plaintiffs to manipulate the contours of a RICO enterprise by requiring proof of each defendant's substantial role in relation to the enterprise. Naming the Circuit Court of the Eleventh Judicial Circuit as the RICO enterprise in the indictment, and later expanding the enterprise to include the entire Eleventh Judicial Circuit, were conscious decisions by the government that vastly simplified its burden at trial. By identifying the broadest possible legitimate entity as the RICO enterprise, the government was able to encompass a greater range and number of allegations, to minimize its burden to prove the effect of the enterprise on interstate commerce, to simplify proof that the Attorneys were associated with the enterprise, and to avoid altogether proof of an association in fact constituting an enterprise. *See United States v. Turkette*, 452 U.S. 576, 580-87 (1981). When the government or a private litigant makes such tactical pleading choices, the *Reves* requirement of operation or management is the only safeguard to assure the necessary nexus between putative RICO defendants, predicate acts, and the enterprise. It is fair and wholly faithful to congressional intent to require the government or civil plaintiffs to meet this burden. *See United States v. Weissman*, 899 F.2d 1111, 1115 (11th Cir. 1990) (the government, through its ability to craft indictments, is the master of the scope of the charged RICO conspiracy and

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845 (1984); *United States v. Jannotti*, 729 F.2d 213, 226 (3d Cir.), *cert. denied*, 469 U.S. 880 (1984); *United States v. Melton*, 689 F.2d 679, 683 (7th Cir. 1982); *United States v. Bright*, 630 F.2d 804, 834 (5th Cir. 1980).

"must be satisfied with the limits of its own creation")(quoting *United States v. Neapolitan*, 791 F.2d 489, 501 (7th Cir.), *cert. denied*, 479 U.S. 939 (1986)). Certiorari is proper.

2. The Eleventh Circuit's decision erroneously removes another limitation on the scope of RICO conspiracies as well -- the multiple conspiracy doctrine. As this Court has stressed, every defendant has a "substantial right[ ] . . . not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others." *Kotteakos v. United States*, 328 U.S. 750, 775 (1946). The multiple conspiracy doctrine and Rule 8(b) of the Federal Rules of Criminal Procedure serve as the primary defenses against the "dangers of transference of guilt from one to another across the line separating conspiracies," *id.* at 774, that arise when the government attempts to try defendants *en masse*. The multiple conspiracy doctrine prohibits prejudicial variance between an indictment that charges a single conspiracy and proof at trial that demonstrates the existence of multiple conspiracies. *Id.* at 772-77. Rule 8(b) prohibit joinder of defendants unless the indictment covers "the same act or transaction" or "the same series of acts or transactions." Fed. R. Crim. P. 8(b).

The decision below guts these protections. By adopting special rules applicable to a RICO conspiracy, the court of appeals has fashioned a result squarely at odds with prior decisions of this Court, the Rules of Criminal Procedure, and basic concepts of due process.

There can be no doubt that the conspiracy charged in the indictment did not exist. The district court found as much when he severed two sets of defendants, the Judges and Massey, from the Attorneys' trial. *See* RV 4, Dkt. 929. At trial, the government did not produce a shred of evidence that the Attorneys were aware of a larger conspiracy involving judges

and other lawyers committing substantive crimes other than bribery. The district court therefore properly refused to instruct the jury about the acts related to those other defendants: "[O]bviously, I'm not going to instruct on these -- what are they -- conspiracy to commit murder, attempted extortion and so forth; ... there's never been any evidence that these defendants knew anything" about those acts. RV 18, Dkt. 1391 at 251-52. The Eleventh Circuit, however, was completely unconcerned with this obvious variance.

Instead, the court of appeals focused on evidence relating only to the Attorneys' crimes. Although the court professed allegiance to *Kotteakos*, *see* App. at 11a, it held that an "overall objective" among the alleged conspirators could be demonstrated through "circumstantial evidence that each defendant must necessarily have known that others were also conspiring to participate in the same enterprise through a pattern of racketeering activity." *Id.* (quoting *United States v. Sutherland*, 656 F.2d 1181, 1193-94 (5th Cir.), *cert. denied*, 455 U.S. 949 (1982)). It was on this basis alone that the court upheld the convictions of petitioner and the other Attorneys, finding that each knew that others had "agreed to use the Circuit Court of the Eleventh Judicial Circuit to engage in a kickback scheme." App. at 12a.

This reasoning is directly at odds with *Kotteakos*. In *Kotteakos*, the Court and the parties accepted the court of appeals' finding that the proof "made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the indictment." *Kotteakos*, 328 U.S. at 754-55. Specifically, "the pattern was `that of separate spokes meeting at a common center,' though . . . without the rim of the wheel to enclose the spokes." *Id.* at 755. The "common center" was Simon Brown, who acted as a broker in placing fraudulent

applications for loans for many different applicants (including the petitioners) -- the "spokes." *See Id.* at 752-54.

Knowledge that others are also engaged in similar criminal activity, even with a "common center," is insufficient alone to support a finding of a single conspiracy. "[I]t is not enough that, when one joins with another in a criminal venture, he knows that his confederate is engaged in other criminal undertakings with other persons, even though they be of the same general nature." *United States v. Lekacos*, 151 F.2d 170, 172 (2d Cir. 1945) (L. Hand, J.), *rev'd, Kotteakos v. United States*, 328 U.S. 750 (1946). Rather, there must be a common interest or venture, giving the spokes an interest in the success of more than just their own schemes. *Id.* at 173. The Supreme Court agreed, repeating Judge Hand's apt analogy: "Thieves who dispose of their loot to a single receiver -- a single 'fence' -- do not by that fact alone become confederates: they may, but it takes more than knowledge that he is a 'fence' to make them such." *Kotteakos*, 328 U.S. at 755 (quoting *Lekacos*, 151 F.2d at 173).[13]

The decision below cannot be reconciled with *Kotteakos*. As in *Kotteakos*, there was a "common center," Judge Gelber, who engaged in separate bribery schemes with the petitioner and the other Attorneys, and who also conspired in different combinations with the Judges and Massey to commit other crimes. There was no evidence among the Attorneys, Judges and Massey of a "common interest or venture" or that any of the Attorneys had an interest in the

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[13] Indeed, the multiple conspiracy finding was upheld despite evidence that some of the petitioners assisted Brown by referring other "borrowers" to him and that at least one of them had secured multiple loans through Brown. *See Lekacos*, 151 F.2d at 172.

success of each other's schemes or in the other criminal activity of Gelber, Massey and the Judges. "[N]o two of [the Attorneys'] agreements were tied together as stages in the formation of a larger, all-inclusive combination, all directed to achieving a single unlawful end or result." *Blumenthal*, 332 U.S. at 558. Rather, each bribery scheme "was an end in itself, separate from all others, although all were alike in having similar illegal objects." *Id.* In short, there were multiple conspiracies.

The Eleventh Circuit and panels of the Third, Fifth and Seventh Circuits have held that RICO supplies the missing link. In essence, these Circuits hold that proof of a single conspiracy is satisfied by proof that the alleged conspirators committed, or agreed to commit, crimes that were somehow connected with the same RICO enterprise, even if they were totally unconnected with each other. *See United States v. Riccobene*, 709 F.2d 214, 224-25 (3d Cir.) ("key element" is proof that crimes were designed "to assist the enterprise's involvement in corrupt endeavors"), *cert. denied*, 464 U.S. 849 (1983); *United States v. Stratton*, 649 F.2d 1066, 1074 (5th Cir. 1981) ("Under RICO it is irrelevant whether 'each defendant participated in the enterprise's through different, even unrelated crimes, so long as . . . each crime was intended to further the enterprise's affairs'."); *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir.) (same), *cert. denied*, 439 U.S. 953 (1978); *United States v. Maloney*, 71 F.3d 645, 664 (7th Cir. 1995) (If defendants "participate in the affairs of the same enterprise," they need not "conspire directly with each other."), *cert. denied*, 117 S. Ct. 295 (1996); *United States v. Lee Stoller Enters., Inc.*, 652 F.2d 1313, 1319 (7th Cir.) ("Under RICO, it is irrelevant that each defendant participated in the enterprise's affairs through different and unrelated crimes."), *cert. denied*, 454 U.S. 1082

(1981); *United States v. Gonzalez*, 921 F.2d 1530, 1540 (11th Cir.) ("That the many defendants and predicate crimes were different, or even unrelated" is "irrelevant," as long as they were "intended to further the enterprise."), *cert. denied*, 502 U.S. 860 (1991); *United States v. Valera*, 845 F.2d 923, 929 (11th Cir. 1988), *cert. denied*, 490 U.S. 1046 (1989).

Some panels of the Fifth and Eleventh Circuits qualify this astounding rule somewhat, as did the court below, by requiring proof of knowledge that others also were conspiring contemporaneously to participate in the affairs of the same enterprise. *See United States v. Sutherland*, 656 F.2d 1181, 1194 (5th Cir. 1981) (involvement of the same enterprise is not enough; without knowledge that others were conspiring to commit racketeering offenses in the conduct of the enterprise, no single conspiracy proven), *cert. denied*, 455 U.S. 949 (1982); *Pepe*, 747 F.2d at 660 ("The government need only prove that each defendant conspired to commit the substantive RICO offense and was aware that others had done likewise."). However, as *Kotteakos* instructs, knowledge of other related criminal activity alone is inadequate proof of a single conspiracy. *Blumenthal*, 332 U.S. at 558; *Kotteakos*, 328 U.S. at 755.

Furthermore, the risk that such a standard will permit the government to try multiple conspiracies as a single conspiracy is particularly grave, where, as here, the government alleges that the RICO enterprise is a legitimate entity, rather than an "association-in-fact" formed specifically to engage in racketeering activity. When the government alleges an association in fact, it must prove that individuals joined together as an "ongoing organization" that functions as a "continuous unit" "for a common purpose of engaging in a course of conduct." *Turkette*, 452 U.S. at 583. In those

circumstances, knowledge or awareness of the enterprise will often (but not always) overlap with knowledge or awareness of the conspiracy.[14] No such overlap exists when the government relieves itself of the obligation to demonstrate the "ongoing organization" and "common purpose" of the enterprise by naming a legitimate entity as the RICO enterprise.

The multiple conspiracy standard employed by the Third, Fifth, Seventh and Eleventh Circuits conflicts with the standard employed by the First and Sixth Circuits, and with Ninth Circuit law on RICO conspiracies. In the First Circuit, "[w]hat counts" is whether "all of the alleged coconspirators directed their efforts towards accomplishment of a common goal or overall plan." *United States v. Boylan*, 898 F.2d 230, 242 (1st Cir.) (citing *United States v. Drougas*, 748 F.2d 817 (1st Cir. 1984)), *cert. denied*, 498 U.S. 849 (1990). Although every defendant need not participate in every aspect of the conspiracy, there must be some degree of "interconnectedness," that is, "the component parts must be linked together in such a way as to afford a plausible basis for the inference that an agreement existed." *Id.* Thus, the First Circuit held improper the joinder of two defendants who agreed on one occasion only to bribe jockeys to fix a horse race, but were tried as part of a conspiracy that encompassed twenty different races and the use of violence, in which they had no role. *United States v. Winter*, 663 F.2d 1120, 1138-39 (1st Cir. 1981), *cert. denied*, 460 U.S.

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[14] Even if the government identifies an association in fact as the enterprise, "the term enterprise is not synonymous with the term conspiracy." *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir.), *cert. denied*, 479 U.S. 939 (1986). In such circumstances, "the proof must establish, and the jury should be instructed to find, that the enterprise does exist and that the enterprise, while it can have the same personal composition as the conspiracy, is a distinct entity." *Id.* at 499-500.

1011 (1983). The Sixth Circuit likewise requires proof that "multiple criminal acts" are "elements of a single scheme," that is, that an "interdependent relationship" exists among them. *United States v. Hughes*, 895 F.2d 1135, 1141 and n.7 (6th Cir. 1990). Although the Ninth Circuit has not addressed the RICO multiple conspiracy issue directly, it requires the government generally to prove "assent to contribute to a common enterprise" in RICO conspiracy cases generally. *Baumer v. Pachl*, 8 F.3d 1341, 1347 (9th Cir. 1993). The government's conspiracy charge in this case likewise flunks either standard.

The RICO multiple conspiracy rules applied by the Third, Fifth Seventh and Eleventh Circuits also conflict with the standards that those Circuits have adopted in other settings not involving a RICO allegation.[15] It is thus not surprising that their courts have held that "agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single `enterprise conspiracy'." *Sutherland*, 656 F.2d at 1192; *Riccobene*, 709 F.2d at 225; *Maloney*, 71 F.3d at 664; *Valera*, 845 F.2d at 930.

Those Circuits have overreached. Nothing in the text or legislative history of Section 1962(d) suggests that Congress

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[15] *See, e.g., United States v. Smith*, 82 F.3d 1261, 1269-71 (3d Cir. 1996) (requiring a "common goal," "common activities" and "interdependence"); *United States v. Morris*, 46 F.3d 410, 415 (5th Cir.) (considerations include "(1) the existence of a common goal; (2) the nature of the scheme; and (3) the overlapping of the participants in the various dealings"), *cert. denied*, 115 S. Ct. 2595 (1995); *United States v. Bullis*, 77 F.3d 1553, 1560 (7th Cir. 1996) ("single design or purpose" contrasted with "distinct illegal ends and no overlapping interests"); *United States v. Reed*, 980 F.2d 1568, 1581-82 (11th Cir.) (considerations are "(1) whether a common goal existed, (2) the nature of the scheme underlying the crimes charged, and (3) the overlap of participants"), *cert. denied*, 509 U.S. 932 (1993).

intended to alter the substantive law of conspiracy. On the contrary, RICO was designed to "provid[e] enhanced sanctions and new remedies" to address the pre-existing "unlawful activities of those engaged in organized crime." *Russello v. United States*, 464 U.S. 16, 27 (1983) (quoting Pub. L. 91-452, 84 Stat. 922, 923). "RICO is a remedial, as opposed to substantive, statute." *United States v. Neapolitan*, 791 F.2d 489, 495, (7th Cir. 1986) (citing *Sedima*, S.P.R.L., 473 U.S. 479, 499-500 (1985); *Turkette*, 452 U.S. at 589). It "serve[s] as the prerequisite for the invocation of increased sanctions for conduct which is proscribed elsewhere in both federal and state criminal codes"; it does not create "new crimes." *Id.*

Certiorari is warranted to correct this fundamental misinterpretation of Section 1962(d) by addressing the limitations to its scope that are posed by the *Kotteakos* multiple conspiracy rule and to resolve the conflict among the Circuits on this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX

89 F.3d 1443

UNITED STATES of America, Plaintiff-Appellant,
v.
William CASTRO, Arthur Luongo, Nancy Lechtner, Harry Boehme, Defendants-
Appellants.

No. 94-4338.

United States Court of Appeals,
Eleventh Circuit.

July 12, 1996.

Defendants were convicted in the United States District Court for the Southern District of Florida, No. 91-708-CR-JAG, Jose A. Gonzalez, Jr., J., of Racketeer Influenced and Corrupt Organizations (RICO) and related *1444 offenses, and they appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) there was no material variance or misjoinder with respect to conspiracy charges; (2) there was sufficient evidence to show that defendants conspired to participate in RICO enterprise; (3) there was no constructive amendment of indictment by instructions or summations; (4) evidence sustained bribery and mail fraud convictions; (5) prosecutor did not engage in misconduct in closing argument; and (6) court properly excluded evidence of specific bad act proffered to impeach prosecution witness.

Affirmed.

Barkett, Circuit Judge, filed a concurring opinion.

Appeal from the United States District Court for the Southern District of Florida.

Before HATCHETT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge.

HATCHETT, Circuit Judge:

In this "Operation Court Broom" appeal, we affirm the appellants' convictions and sentences.

FACTS

In the late 1980s, federal and state law enforcement officials conducted "Operation Court Broom," an investigation into alleged corrupt activities occurring among judges and lawyers in the Dade County Florida Circuit Court. One of the targets of the investigation, Roy T. Gelber, took the office of circuit court judge for the Eleventh Judicial Circuit in Dade County in January 1989. Prior to becoming a circuit court judge in 1989, Gelber served as an elected county court judge for Dade County since 1987 and previously had practiced as a criminal defense attorney.

In Metropolitan Dade County, circuit court judges have the authority to appoint special assistant public defenders (SAPDs) and approve their compensation terms for which Metropolitan Dade County issues payment upon receipt of a court approved bill: Shortly after assuming the position of

circuit court judge, Gelber had discussions with another circuit court judge, Alfonso C. Sepe, regarding making SAPD appointments for kickbacks. Sepe arranged to have Gelber appoint Arthur Massey, a lawyer, as an SAPD in return for kickbacks. Gelber appointed Massey to some cases and received kickbacks for those appointments. Likewise, Judge Harvey N. Shenberg arranged for Gelber to appoint Manny Casabielle and Miguel DeGrandy, lawyers, as SAPDs in return for kickback payments.

In August of 1989, state and federal law enforcement officials procured the services of Raymond Takiff, a lawyer, to act in an undercover capacity as a corrupt lawyer in the Operation Court Broom investigation. From August 1989 to June 1991, Takiff engaged in a number of corrupt activities with Gelber and other judges in the Eleventh Judicial Circuit. Most of Gelber's conversations with Takiff regarding illegal conduct were tape-recorded. Takiff enlisted Gelber and other judges in activities ranging from paying kickbacks and fixing cases to releasing the name of a confidential informant believing that the informant would be killed. Sepe, Shenberg, and Judge Philip S. Davis participated in many of the schemes.

During the relevant period, Gelber recruited his secretary to assist him in the kickback scheme. Gelber asked the secretary if she knew any lawyers who would be willing to accept appointments as SAPDs in return for paying him kickbacks. Upon her agreement, Gelber used the secretary as a conduit to lawyers agreeing to join the kickback scheme. The secretary approached Arthur Luongo, Harry Boehme, and Nancy Lechtner, all lawyers, asking them to join in the kickback scheme. All of the lawyers agreed ***1448** to accept SAPD appointments in exchange for paying kickbacks.

Gelber approached William Castro, a lawyer, in the fall of 1989 about the possibility of Castro investing in Gelber's corporation. Castro did not want to invest in the corporation, but he agreed to assist Gelber financially through paying kickbacks for receiving SAPD appointments. Gelber and Castro agreed that Castro would pay Gelber twenty percent of his anticipated fees within a few days of receiving appointments. Gelber began appointing Castro to cases, and Castro paid kickbacks for those appointments. Gelber received an average kickback payment of $1,000 from Castro. A few months after Castro began paying kickbacks to Gelber, Castro convinced Gelber to bring Kent Wheeler, a lawyer, into the kickback scheme. Castro served as an intermediary between Gelber and Wheeler because Gelber did not know Wheeler well.

From October 1989 to June 8, 1991, Gelber appointed Castro to sixty-four cases and received $77,000 in kickbacks. From January 1990 to June 8, 1991, Gelber appointed Wheeler to thirty-seven cases and received $34,000 in kickbacks. Similarly, Gelber appointed Boehme to twelve cases for $13,000 in kickbacks; Lechtner to four cases for $7,000 in kickbacks; and Luongo to thirty-one cases for over $20,000 in kickbacks.

PROCEDURAL HISTORY

On May 27, 1992, a federal grand jury in the Southern District of Florida returned a superseding 106-count indictment against William Castro, Arthur Luongo, Harry Boehme, Nancy Lechtner, (appellants) and codefendants Harvey N. Shenberg, Alfonso Sepe, Phillip Davis, David Goodhart, and Arthur Massey. The indictment charged appellants with conspiracy to

violate RICO in violation of 18 U.S.C. §§ 1962(d) and 1963(a), mail fraud in violation of 18 U.S.C. §§ 1341, 1346, and bribery in violation of 18 U.S.C. § 666(a)(2).[1]

Appellants moved to dismiss the RICO conspiracy count, mail fraud, and bribery counts for failure to state an offense. The district court denied these motions. In July 1992, appellants filed their first round of severance motions based on prejudicial misjoinder seeking separate trials from each other, codefendant Massey, and the indicted judges. The district court severed the trial of Judges Goodhart, Sepe, Shenberg, and Davis from appellants' trial, and severed Massey's trial from the appellants. The district court denied appellants' subsequent motions to sever their trials from each other. The trial began on October 25, 1993. At the close of the government's case-in-chief, appellants moved for judgment of acquittal on all counts under Rule 29 of the Federal Rules of Criminal Procedure. The district court denied the motions. Appellants renewed the motions at the conclusion of their case, and the district court again denied the motions. The jury returned guilty verdicts as to all appellants on all counts.

The district court sentenced Castro to concurrent terms of thirty-seven months imprisonment, three years supervised release, and ordered him to pay a $1,400 special assessment. The district court sentenced Luongo to thirty-seven months imprisonment, three years supervised release, and ordered him to pay $850 in fines. The district court sentenced Lechtner to concurrent terms of thirty months imprisonment, three years supervised release, and ordered her to pay a $300 special assessment. The district court sentenced Boehme to concurrent

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[1] Gelber, an unindicted co-conspirator, pleaded guilty to RICO conspiracy and testified for the government.

terms of twenty-four months imprisonment, two years supervised release, and ordered him to pay a $500 special assessment. This appeal followed.

CONTENTIONS

First, appellants contend that the government failed to prove the existence of a single RICO conspiracy. Appellants assert that the government offered proof of multiple conspiracies, and that this constitutes an impermissible variance from the charge of a single ***1449** conspiracy. Appellants also claim that the district court's failure to sever their trial amounted to a misjoinder. Second, appellants contend that the government failed to present evidence sufficient to establish that they agreed to affect the "operation or management" of the RICO enterprise as required under *Reves v. Ernst & Young*, 507 U.S. 170, 113 S. Ct. 1163, 122 L.Ed.2d 525 (1993).

Third, appellants contend that the district court's jury instructions and the prosecutor's summation constructively amended the RICO conspiracy count of the indictment by referring to the Eleventh Judicial Circuit as the RICO enterprise, rather than the Circuit Court of the Eleventh Judicial Circuit. Appellants insists that the district court's instructions and the prosecutor's summation resulted in an expansion of the indictment because the government failed to introduce evidence demonstrating that the Circuit Court of the Eleventh Judicial Circuit affected interstate commerce.

Fourth, appellants contend that their bribery convictions cannot stand because the evidence failed to prove that they intended to influence an agent of Metropolitan Dade County. Specifically, appellants argue that since the government

charged Metropolitan Dade County as the agency receiving federal grant money, under 18 U.S.C. § 666 the government had to prove that appellants' bribes were intended to influence or reward an agent of Metropolitan Dade County.

Fifth, appellants contend that the mail fraud counts fail to state an offense. Appellants assert that 18 U.S.C. § 1346 does not protect a sovereign state from the fraudulent deprivation of intangible rights. Also, appellants maintain that the term "honest services" in section 1346 is unconstitutionally vague. Sixth, appellants contend that the prosecutor impermissibly vouched for the credibility of a government witness and made improper and prejudicial remarks during closing arguments. Seventh, appellants contend that the district court erred in preventing them from offering evidence to prove a government witness's self-interest, bias, and motive.

First, the government contends that a RICO conspiracy charge brings a defendant within the conspiracy regardless of the unrelatedness of the acts of the other members of the conspiracy as long as the government can show an agreement on an overall objective or that the defendant agreed to the commission of two or more predicate acts, individually or through others. The government contends that no material variance occurred because a reasonable trier of fact could have found beyond a reasonable doubt the existence of a single conspiracy. Also, for this reason, the government contends that the appellants were properly joined.

Second, the government contends that the appellants were convicted of a RICO conspiracy, and not a substantive RICO offense. Therefore, the government only had to allege and prove that the appellants "agreed" to affect the operation or management of the RICO enterprise, and not that the appellants actually exerted any control or direction over the RICO

enterprise. Third, the government contends that when the prosecutor's summation and the district court's instructions are viewed in context, it is clear that no constructive amendment occurred. Fourth, the government contends that the evidence presented at trial was sufficient to establish that appellants intended to influence an agent of Metropolitan Dade County.

Fifth, the government contends that the plain language of 18 U.S.C. §§ 1341 and 1346 does not exclude governmental entities such as a state from coverage under the mail fraud statute. The government also asserts that this circuit has already rejected a void-for-vagueness challenge to section 1346. Sixth, the government contends that it properly argued the credibility of the witness based on the evidence in the record and did not make prejudicial remarks during closing arguments. Seventh, the government contends that the district court did not abuse its discretion in preventing appellants' proffer of extrinsic evidence to show specific prior conduct to impeach a government witness.

ISSUES

The issues we address in this appeal are: (1) whether a material variance or misjoinder occurred; (2) whether sufficient evidence existed ***1450** to establish that appellants conspired to participate in the RICO enterprise; (3) whether the district court's instructions and the prosecutor's summations constructively amended the RICO conspiracy count of the indictment; (4) whether appellants were properly convicted for bribery under 18 U.S.C. § 666(a)(2); (5) whether appellants were properly convicted for mail fraud under 18 U.S.C. §§ 1341, 1346; (6) whether prosecutorial misconduct occurred through impermissible vouching for witness's credibility and

through improper remarks; and (7) whether the district court abused its discretion in excluding appellants' proffered evidence.

STANDARDS OF REVIEW

This appeal involves multiple issues requiring differing standards of review. We review the claim of a material variance through viewing the evidence in the light most favorable to the government to determine whether a reasonable trier of fact could have found that a single conspiracy existed beyond a reasonable doubt. *United States v. Reed*, 980 F.2d 1568, 1581 (11th Cir.), *cert. denied*, 509 U.S. 932, 113 S. Ct. 3063, 125 L.Ed.2d 745 (1993). We will uphold the conviction unless the variance (1) was material and (2) substantially prejudiced the defendant. *Reed*, 980 F.2d at 1581. Our review of the claim of a misjoinder is plenary. *United States v. Morales*, 868 F.2d 1562, 1567 (11th Cir. 1989).

We review the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in favor of the jury's verdict. *United States v. Church*, 955 F.2d 688, 693 (11th Cir.), *cert. denied*, 506 U.S. 881, 113 S. Ct. 233, 121 L.Ed.2d 169 (1992). In evaluating whether the indictment was constructively amended, we review the district court's jury instructions and the prosecutor's summation "in context" to determine whether an expansion of the indictment occurred either literally or in effect. *United States v. Behety*, 32 F.3d 503, 509 (11th Cir. 1994), *cert. denied*, --- U.S. ----, 115 S. Ct. 2568, 132 L.Ed.2d 820 (1995).

In reviewing the claim of prosecutorial misconduct, we assess (1) whether the challenged comments were improper and

(2) if so, whether they prejudicially affected the substantial rights of the defendant. *United States v. Obregon*, 893 F.2d 1307, 1310 (11th Cir.), *cert. denied*, 494 U.S. 1090, 110 S. Ct. 1833, 108 L.Ed.2d 961 (1990). We review a district court's evidentiary rulings for abuse of discretion. *United States v. Calle*, 822 F.2d 1016, 1020 (11th Cir. 1987). Finally, our review of a district court's legal conclusion is de novo. *United States v. Waymer*, 55 F.3d 564, 568 (11th Cir. 1995).

DISCUSSION

I. Material Variance and Joinder

Appellants contend that at best the government's proof at trial revealed the existence of multiple conspiracies even though the indictment only charged a single conspiracy. For this reason, appellants claim that a material variance occurred that constitutes reversible error under *United States v. Sutherland*, 656 F.2d 1181, 1189 (5th Cir. Unit A 1981), *cert. denied*, 455 U.S. 949, 102 S. Ct. 1451, 71 L.Ed.2d 663 (1982).[2] Appellants also contend that they were improperly joined because the government failed to prove that any of them knew about other lawyers participating in the kickback scheme or whether any of them knew of the existence of a single conspiracy.

A material variance between an indictment and the government's proof at trial occurs if the government proves multiple conspiracies under an indictment alleging only a single

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit Court of Appeals rendered prior to October 1, 1981.

conspiracy. *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L.Ed. 1557 (1946). In order to prove a RICO conspiracy, the government must show an agreement to violate a substantive RICO provision. *United States v. Gonzalez*, 921 F.2d 1530, 1539 (11th Cir.), *cert. denied*, 502 U.S. 860, 112 S. Ct. 178, 116 L.Ed.2d 140 ***1451** (1991). Specifically, the government must prove that the conspirators agreed to participate directly or indirectly in the affairs of an enterprise through a pattern of racketeering activity. 18 U.S.C.A. § 1962(d) (West 1984); *United States v. Sutherland*, 656 F.2d 1181, 1191-1192 (5th Cir. Unit A 1981), *cert. denied*, 455 U.S. 949, 102 S. Ct. 1451, 71 L.Ed.2d 663 (1982).

The government may prove the existence of an "agreement" to participate in a RICO conspiracy through showing (1) the existence of an agreement on an overall objective, or (2) in the absence of an agreement, on an overall objective that the defendant agreed personally to commit two or more predicate acts. *United States v. Church*, 955 F.2d 688, 694 (11th Cir. 1992), *cert. denied*, 506 U.S. 881, 113 S. Ct. 233, 121 L.Ed.2d 169 (1992). In meeting its burden of proof on showing an agreement on an overall objective, the government must offer direct evidence of an explicit agreement on an overall objective or, in the absence of direct evidence, the government must offer circumstantial evidence demonstrating "that each defendant must necessarily have known that others were also conspiring to participate in the same enterprise through a pattern of racketeering activity." *Sutherland*, 656 F.2d at 1193-94; *see also, United States v. Valera*, 845 F.2d 923, 929- 30 (11th Cir. 1988), *cert. denied*, 490 U.S. 1046, 109 S. Ct. 1953, 104 L.Ed.2d 422 (1989).

In this case, the indictment charged a single RICO conspiracy, and the government presented evidence that

adequately proved the existence of a single conspiracy. At trial, Gelber testified that he informed the appellants that they would not only receive appointments from him but also from another judge in the circuit court. In light of this testimony, each appellant knew that at least two circuit judges agreed to use the Circuit Court of the Eleventh Judicial Circuit to engage in a kickback scheme. In addition to Gelber's testimony, other evidence adduced at trial indicates appellants' agreement to participate in and awareness that others also participated in a single conspiracy. For example, when Gelber's secretary asked appellant Boehme to enroll in the kickback scheme, she asked him whether he wished to join the "preferred list" for court appointments. Similarly, appellant Lechtner was informed that a kickback scheme was "something that's being done" in the Circuit Court of the Eleventh Judicial Circuit. Appellant Castro actually recruited another lawyer to join the kickback scheme. In light of this evidence, we find that each appellant agreed on an overall objective and agreed personally to commit two or more predicate acts by paying kickbacks for SAPD appointments.

Additionally we note that, contrary to appellants' assertions, in proving the existence of a single RICO conspiracy, the government does not need to prove that each conspirator agreed with every other conspirator, knew of his fellow conspirators, was aware of all of the details of the conspiracy, or contemplated participating in the same related crime. *United States v. Pepe*, 747 F.2d 632, 659-60 (11th Cir. 1984).[3] In viewing the evidence in the light most favorable to

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[3] We note that when a defendant "embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them."

the government, a jury could have reasonably concluded that one common agreement on a single overall objective existed. Consequently, we find that no material variance occurred.

In considering appellants' misjoinder claim, we recognize that the Federal Rules of Criminal Procedure prohibit joinder of defendants unless the indictment covered the same act or transaction or the same series of acts or transactions. S. Ct. 8(b). In this circuit we have observed that "[w]hether or not separate offenses are part of a 'series of acts or transactions' under 8(b) depends ... on the relatedness of the facts underlying each offense.... [W]hen the facts underlying each offense are so closely connected that proof of such facts is necessary to establish each offense, joinder of defendants and offenses is proper." *United States v. Welch*, 656 F.2d 1039, 1049 (5th Cir. ***1452**Unit A 1981) (quoting *United States v. Gentile*, 495 F.2d 626, 630 (5th Cir. 1974)), *cert. denied*, 456 U.S. 915, 102 S. Ct. 1767, 1768, 72 L.Ed.2d 173 (1982).

Since more than sufficient evidence existed in this trial to support the indictment and conviction of a single conspiracy, we conclude that no misjoinder occurred. *United States v. Weinstein*, 762 F.2d 1522, 1541, modified on other grounds, 778 F.2d 673 (11th Cir. 1985), *cert. denied*, 475 U.S. 1110, 106 S. Ct. 1519, 89 L.Ed.2d 917 (1986).[4]

United States v. Elliott, 571 F.2d 880, 905 (5th Cir. 1978) (quoting *United States v. Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944)).

[4] Even where the evidence does not support proof of a single conspiracy, we will not overturn a conviction unless either (1) the proof adduced at trial was so different from the indictment so as to unfairly surprise defendants in the preparation of their defense, or (2) so many defendants exist that the jury was likely to confuse the evidence at trial among the defendants. *United States v. LeQuire*, 943 F.2d 1554, 1561 (11th Cir. 1991) (citing *United States v. Caporale*, 806 F.2d 1487, 1500 (11th Cir. 1986), *cert. denied*, 483

II. Sufficiency of the Evidence

Appellants contend that the government's evidence was insufficient to establish that they conspired to participate in the "operation or management" of the RICO enterprise. Appellants argue that under *Reves v. Ernst & Young*, 507 U.S. 170, 113 S. Ct. 1163, 122 L.Ed.2d 525 (1993), the government was required to produce evidence showing that appellants agreed to exercise control or direction in the management of the Circuit Court of the Eleventh Judicial Circuit. Appellants suggest that as outsiders they could not have exerted the requisite degree of control over the "operation or management" of the Circuit Court of the Eleventh Judicial Circuit to meet the requirements of *Reves*.

As a preliminary matter, we reject appellants' limited reading of *Reves*. Under *Reves*, section 1962(c) liability is not limited to insiders or upper management as appellants suggests. *Reves*, 507 U.S. at 184-86, 113 S. Ct. at 1173. In *Reves*, the Supreme Court emphasized that because the statute includes the phrase "to participate directly or indirectly," RICO liability is not confined to those with a formal position in the enterprise. *Reves*, 507 U.S. at 178-80, 113 S. Ct. at 1170.[5] The language

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U.S. 1021, 107 S. Ct. 3265, 97 L.Ed.2d 763 (1987)), *cert. denied*, 505 U.S. 1223, 112 S. Ct. 3037, 120 L.Ed.2d 906 (1992).

[5] In fact, the Court expressly disagreed with the District of Columbia Circuit's suggestion that section 1962(c) requires significant control over or within an enterprise. *Reves*, 507 U.S. at 176-78, 179 n. 4, 113 S. Ct. at 1169, 1170 n.4 (1993). Outsiders may exert control over an enterprise's affairs through illegal means sufficient to satisfy *Reves*'s requirements. *See, e.g., Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1559-60 (1st Cir. 1994) (auto repair shop, its employees, and insurance claimants who submitted fraudulent claims to insurance company caused the insurance

in *Reves* indicates that persons in appellants' position fall within the scope of section 1962(c)'s coverage because "an enterprise might be operated or managed by others associated with the enterprise who exert control over it as, for example, by bribery." *Reves*, 507 U.S. at 184, 113 S. Ct. at 1173 (emphasis added).

We reject the appellants' narrow reading of *Reves* and their attempt to infuse the *Reves* analysis into this case. In this case, the indictment charged the appellants with RICO conspiracy under section 1962(d), and not a substantive RICO offense under section 1962(c). This court recently decided that the *Reves* "operation or management" test does not apply to section 1962(d) convictions. *United States v. Starrett*, 55 F.3d 1525, 1547 (11th Cir. 1995); *see also Napoli v. United States*, 45 F.3d 680, 683, 684 (2d Cir.), *cert. denied*, --- U.S. ----, 115 S. Ct. 1796, 131 L.Ed.2d 724 (1995). Our view of the evidence in the light most favorable to the government indicates that more than sufficient evidence existed to demonstrate that appellants "agreed" to affect the operation or management of the Circuit Court of the Eleventh Judicial Circuit through paying kickbacks.

III. Constructive Amendment of Indictment

A constructive "amendment occurs when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction ***1453** beyond what is contained in the indictment." *United States v. Behety*, 32 F.3d 503, 508 (11th Cir. 1994) (quoting *United States v.*

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company to pay out large sums of money and thus exerted sufficient control over affairs of the insurance company to satisfy the dictates of *Reves*).

Keller, 916 F.2d 628, 634 (11th Cir. 1990), *cert. denied*, 499 U.S. 978, 111 S. Ct. 1628, 113 L.Ed.2d 724 (1991)), *cert. denied* --- U.S. ----, 115 S. Ct. 2568, 132 L.Ed.2d 820 (1995). The indictment may be amended as a result of erroneous jury instructions or a prosecutor's statements. *Behety*, 32 F.3d at 508. When a constructive amendment occurs it violates "a fundamental principle" stemming from the Fifth Amendment: specifically, "that a defendant can only be convicted for a crime charged in the indictment." *United States v. Keller*, 916 F.2d 628, 633 (11th Cir. 1990), *cert. denied*, 499 U.S. 978, 111 S. Ct. 1628, 113 L.Ed.2d 724 (1991).

In this case, appellants contend that a constructive amendment of the indictment occurred on the RICO conspiracy count because both the prosecutor's summation and the district court's jury instructions substituted the "Eleventh Judicial Circuit" for the "Circuit Court of the Eleventh Judicial Circuit" as the RICO enterprise affecting interstate commerce. Appellants argue that the jury relied on proof of the Eleventh Judicial Circuit's effect on interstate commerce. Appellants claim that the government failed to prove that the Circuit Court of the Eleventh Judicial Circuit affected interstate commerce.

In determining whether an indictment was constructively amended, we must assess the prosecutor's comments and the court's instructions "in context" to see whether the indictment was expanded either literally or in effect. *United States v. Andrews*, 850 F.2d 1557, 1559 (11th Cir. 1988) (en banc), *cert. denied*, 488 U.S. 1032, 109 S. Ct. 842, 102 L.Ed.2d 974 (1989). Admittedly, at trial, the prosecutor referred to the Eleventh Judicial Circuit, rather than the Circuit Court of the Eleventh Judicial Circuit, as the RICO enterprise in his closing argument. The prosecutor immediately informed the jury, however, to rely on Judge Smith's testimony

which only defined the Circuit Court of the Eleventh Judicial Circuit. Similarly, the district court instructed the jury that the Eleventh Judicial Circuit was the RICO enterprise that must have affected interstate commerce to satisfy the requirements of section 1962(d).

Even though the jury heard the term Eleventh Judicial Circuit during the trial, the government's evidence focused on the circuit court's effect on interstate commerce. For example, the government presented testimony from the court administrator for the Eleventh Judicial Circuit of Dade County who testified that the circuit court judges traveled out of state on business. Moreover, he testified that the circuit court purchased and used computers, books, and supplies from vendors outside of Florida. Neither the court administrator nor Judge Smith explained to the jury that the Circuit Court of the Eleventh Judicial Circuit was a division of the Eleventh Judicial Circuit.

When we view the prosecutor's single remark, the district court's instructions, and the evidence proffered at trial in context, we do not believe the jury could have convicted appellants based upon a charge not contained in the indictment.

IV. Bribery Convictions

Appellants contend that their bribery convictions must be reversed. Appellants assert that since the government charged them under 18 U.S.C. § 666(a)(2), the government was required to show that they intended to enter into a direct exchange with an agent of the organization receiving federal

funds.[6] Appellants argue that the government produced no evidence showing that they intended to influence or reward anyone in the Dade County Finance Department. Moreover, appellants challenge the sufficiency of the evidence presented at trial to establish that ***1454** Metropolitan Dade County received federal grants in excess of $10,000.

At trial, the appropriate inquiry was: did the government prove beyond a reasonable doubt that the appellants (1) gave or offered to give a thing of value to any person (2) with the corrupt intent to influence or reward an agent of an organization that in a one-year period received benefits in excess of $10,000 under a federal program (3) in connection with any business transaction or series of transactions of such organization, government, or agency involving anything of the value of $5,000 or more. 18 U.S.C.A. § 666(a)(2) (West 1976 & Supp.1995). The government presented evidence at trial establishing that the appellants (1) paid kickbacks to Judge Gelber (2) with the intent to have Judge Gelber appoint them as SAPDs and authorize an agent of the Dade County Finance Department to issue them compensation checks (3) in connection with their rendering of legal services of a value exceeding $5,000.

We reject appellants' suggestion that the government had to show a direct quid pro quo relationship between them

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[6] The statute provides in relevant part: (a) Whoever, if the circumstance described in subsection (b) of this section exists--(2) corruptly gives, offers, or agrees to give anything of value to any person with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more . . . . 18 U.S.C.A. § 666(a)(2) (West 1976 & Supp. 1995).

and an agent of the agency receiving federal funds. We believe that the appellants' narrow reading of the bribery statute would belie the statute's purpose "to protect the integrity of the vast sums of money distributed through federal programs from theft, fraud, and undue influence by bribery." S.Rep. No. 225, 98th Cong., 2d Sess. 369-370 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3510-11. It is clear from the record that the appellants knew that payments for SAPD services came from Metropolitan Dade County and not the circuit court. Moreover, appellants also knew that they could not receive payments from Metropolitan Dade County unless a circuit court judge authorized Metropolitan Dade County to pay the bill or influenced an agent in the Dade County Finance Department to issue the checks. We believe that the government proved that appellants not only intended to influence Gelber, but they also intended to influence an agent in the Dade County Finance department by having Gelber authorize the agent to issue payments for their SAPD services. Accordingly, we hold that appellants were properly convicted of bribery under 18 U.S.C. § 666(a)(2).

Appellants also contend that the district court erred in admitting the testimony, over objections, establishing that Metropolitan Dade County received federal grants in excess of $10,000. Appellants argue that the district court should have excluded the testimony of Willis Patterson, an assistant controller in the Dade County Finance Department, as a violation of Federal Rules of Evidence 602 and 1002.

We cannot agree with appellants' suggestion that the district court abused its discretion in admitting Patterson's testimony. According to Rule 602 of the Federal Rules of Evidence, a witness may not testify to a matter unless evidence is introduced to establish that the witness possesses personal

knowledge of the matter.[7] In this case, the record shows that Patterson had personal knowledge about the federal grants that Metropolitan Dade County received. Patterson testified that he was the assistant controller of the Dade County Finance Department for the past seven years, and his department was responsible for receiving federal grant monies on behalf of the county.[8] The defense had an opportunity to cross-examine Patterson about his personal knowledge but did not examine him. Accordingly, we find that the district court did not abuse its discretion in admitting this testimony.

***1455** Similarly, we reject appellants' contention that under Rule 1002 of the Federal Rules of Evidence or "the best evidence rule" the district court should have precluded Patterson's testimony because the government should have entered composite exhibit 406 that detailed federal funds Metropolitan Dade County received. We do not believe that Rule 1002 of the Federal Rules of Evidence was implicated in this case because the questions posed to Patterson did not seek to elicit the "contents" of composite exhibit 406. *See, e.g., Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1542-43 (11th Cir. 1994) (recognizing that Fed.R.Evid. 1002 does not always require the introduction of a writing merely because the writing

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[7] Rule 602 provides: A witness may not testify to a matter unless evidence is introduced sufficient to introduce a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses. Fed. R. Evid. 602.

[8] Although Patterson could not recall the specific number of grants Dade County received from 1988 to 1991, he testified that the grants exceeded $90 million in each year during that time period which is substantially more than the $10,000 statutory requirement under 18 U.S.C. § 666.

contains facts similar to the testimony). Rather, the questions were aimed at showing that Dade County received substantially more than $10,000 in federal grants, and not necessarily the exact amount or details surrounding the county's receipt of millions of dollars in federal grants. *See Swann*, 27 F.3d at 1542-43 (finding that the best evidence rule was not implicated where an insurance underwriting manager's answers to questions based on his familiarity with underwriting guidelines and did not necessarily require him to state the contents of the underwriting guidelines).

V. Mail Fraud

Appellants seek to invalidate their mail fraud conviction because they claim (1) that the term "honest services" in the mail fraud statute is unconstitutionally vague, and (2) that the mail fraud statute does not extend to cover schemes whose ultimate intent is to deprive a sovereign state of intangible rights.

Since the appellants' void-for-vagueness challenge to section 1346 does not raise a First Amendment issue, we will consider section 1346 as applied to the facts of this case. *United States v. Waymer*, 55 F.3d 564, 568 (11th Cir. 1995); *United States v. Awan*, 966 F.2d 1415, 1424 (11th Cir. 1992). In assessing a statute under a void-for-vagueness challenge, we may find a statute unconstitutionally vague when it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L.Ed.2d 903 (1983).

Moreover, this court has observed that "[t]he

constitutionality of a vague statutory standard is closely related to whether the standard incorporates a requirement of mens rea." *Waymer*, 55 F.3d at 568 (citing *Colautti v. Franklin*, 439 U.S. 379, 99 S. Ct. 675, 58 L.Ed.2d 596 (1979)). In *United States v. Conner*, this court also mentioned that "the statutory requirement that an act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense which the accused was unaware." *United States v. Conner*, 752 F.2d 566, 574 (11th Cir.) (quoting *Screws v. United States*, 325 U.S. 91, 102, 65 S. Ct. 1031, 1036, 89 L.Ed. 1495 (1945) (Douglas, J., concurring)), *cert. denied sub nom., Taylor v. United States*, 474 U.S. 821, 106 S. Ct. 72, 88 L.Ed.2d 59 (1985). When the Second Circuit addressed a challenge to section 1341 of the mail fraud statute in *United States v. Margiotta*, that circuit found that section 1341 was not unconstitutionally vague because it "contains the requirement that the defendant must have acted willfully and with the specific intent to defraud." *United States v. Margiotta*, 688 F.2d 108, 129 (2d Cir. 1982), *cert. denied*, 461 U.S. 913, 103 S. Ct. 1891, 77 L.Ed.2d 282 (1983).

We believe that the reasoning from the foregoing cases is instructive here. In this case, the government had to prove that the appellants had the "specific intent" to defraud. 18 U.S.C.A. §§ 1341, 1346 (West 1984 & Supp.1995). The jury found that appellants had the specific intent to defraud the state of Florida of its honest services. In light of the foregoing reasoning, we hold that the term "honest services" in section 1346 was not unconstitutionally vague as applied to the

appellants.[9]

***1456** In considering appellants' argument regarding the scope of the mail fraud statute's protection, we decline to adopt appellants' construction of 18 U.S.C. §§ 1341 and 1346. Under appellants' interpretation of sections 1341 and 1346, the mail fraud statute would not protect states. First, appellants contend that it is inconsistent with federalism principles to apply this statute to a sovereign state. The Supreme Court has made it clear, however, that Congress may forbid putting letters into the post office when "such acts are done in furtherance of a scheme that it regards contrary to public policy, whether it can forbid the scheme or not." *Badders v. United States*, 240 U.S. 391, 393, 36 S. Ct. 367, 368, 60 L.Ed. 706 (1916). Therefore, appellants' federalism argument is without merit.

Appellants also suggest that Congress's enactment of section 1346 restricts section 1341's protection to nongovernmental victims. In 1988, Congress enacted section 1346 of the mail fraud statute to state an offense for the deprivation of intangible rights such as "honest services," thus overruling the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875, 97 L.Ed.2d 292 (1987). Pub.L. No. 100-690, § 7603, 102 Stat. 4508 (codified as amended at 18 U.S.C. § 1346 (1988)); see also 134 Cong.Rec. H11,251 (daily ed. Oct. 21, 1988). Appellants assert that sections 1341 and 1346 read together seek to punish "whoever having devised or intended to devise any scheme or artifice to deprive 'another' of the intangible right of honest services ... places in any post office or authorized depository for mail

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[9] Appellants did not challenge the sufficiency of the evidence regarding the jury's findings of specific intent to defraud. Also, appellants do not challenge the jury instructions on specific intent.

matter...." Appellants argue that the term "another" cannot encompass a state. We disagree.

Neither the plain language of section 1346 nor its legislative history supports the limitation appellants urge. We find it instructive to note that prior to section 1346's enactment, similar questions arose regarding the reach of section 1341's protection. In *United States v. Martinez*, the Third Circuit found that the mail fraud statute protected the Commonwealth of Pennsylvania from deprivation of its property interests. *United States v. Martinez*, 905 F.2d 709, 715 (3d Cir.), *cert. denied*, 498 U.S. 1017, 111 S. Ct. 591, 112 L.Ed.2d 595 (1990).

Indeed, other cases decided based upon section 1341 violations, prior to the clarifying amendment of section 1346, support our finding that the mail fraud statute does protect governmental entities such as a state. *See, e.g., United States v. Coyne*, 4 F.3d 100, 110-11 (2d Cir. 1993) (upholding mail fraud convictions where a county was victim of mail fraud); *United States v. Paccione*, 949 F.2d 1183 (2d Cir. 1991) (affirming mail fraud conviction where city of New York defrauded), *cert. denied*, 505 U.S. 1220, 112 S. Ct. 3029, 120 L.Ed.2d 900 (1992); *United States v. Wilson*, 904 F.2d 656, 660-61 (11th Cir. 1990) (upholding mail fraud conviction where indictment alleged defendants intended to defraud the Internal Revenue Service), *cert. denied*, 502 U.S. 889, 112 S. Ct. 250, 116 L.Ed.2d 205 (1991). We can discern no reason to read sections 1341 and 1346 as appellants suggest to exclude states, and presumably, all governmental entities from the mail fraud statute's protection. We believe that such a result would belie a clear congressional intent to construe the mail fraud statute broadly. *See generally United States v. Martinez*, 905 F.2d 709 (3d Cir. 1990).

VI. Prosecutorial Misconduct

Appellants contend that prosecutorial misconduct occurred in two respects. First, appellants allege that the prosecutor impermissibly vouched for the credibility of Gelber, the government's main witness. Primarily, appellants' challenge the prosecutor's attempts to elicit testimony from Gelber regarding the truth telling provisions in his plea agreement. Second, appellants contend that the prosecutor made disparaging remarks about the defense attorneys and other improper remarks. Appellants state that the prosecutor suggested that prosecutors are sworn to pursue justice while criminal defense attorneys are beholden to the manipulation of the justice system.

When faced with a question of whether improper vouching occurred we ask: ***1457** "whether the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness's credibility." *United States v. Sims*, 719 F.2d 375, 377 (11th Cir. 1983), *cert. denied*, 465 U.S. 1034, 104 S. Ct. 1304, 79 L.Ed.2d 703 (1984). In applying this test, we look for whether (1) the prosecutor placed the prestige of the government behind the witness by making explicit assurances of the witness's credibility, or (2) the prosecutor implicitly vouched for the witness's credibility by implying that evidence not formally presented to the jury supports the witness's testimony. *Sims*, 719 F.2d at 377.

Since appellants' initial concern is about Gelber's testimony surrounding his plea agreement, we note that prosecutors are not generally prohibited from entering a plea agreement into evidence for the jury's consideration. *United States v. Dennis*, 786 F.2d 1029, 1047 n. 18 (11th Cir. 1986), *cert. denied*, 481 U.S. 1037, 107 S. Ct. 1973, 95 L.Ed.2d 814

(1987). Moreover, our careful review of the circumstances under which this testimony was elicited compels us to find that a jury could not have reasonably believed that the prosecutor was personally vouching for Gelber's credibility, or that the prosecutor was indicating that evidence beyond what was presented to the jury supported Gelber's testimony. In this case, the prosecutor merely questioned Gelber about the requirements of the plea agreement to testify fully and truthfully. Furthermore, in his questioning of Gelber, the prosecutor merely pointed out that Gelber risked prosecution if he perjured himself. We have found similar questioning proper. *See United States v. Sims*, 719 F.2d 375, 377 (11th Cir. 1983), *cert. denied*, 465 U.S. 1034, 104 S. Ct. 1304, 79 L.Ed.2d 703 (1984). Consequently, we find that no prosecutorial misconduct occurred with respect to impermissible vouching.

A similar result obtains in our consideration of the prosecutor's alleged disparaging remarks and other improper statements. We may find prosecutorial misconduct where (1) a prosecutor makes improper remarks (2) that prejudicially affect the substantial rights of the defendant. *United States v. Eyster*, 948 F.2d 1196, 1206 (11th Cir. 1991).

Both the prosecution and defense came close to making improper comments as they exchanged vitriol during closing arguments. Appellants challenge the prosecutors following remark: "And these fellows here, these guys are prosecutors, they're sworn to be prosecutors, to pursue justice. These defense counsel, they represent their clients, they come in here and say what they want to help their clients." While we do not condone the prosecutor's remarks, we cannot find that they constitute grounds for reversal. The prosecutor made the statement on rebuttal in response to the defense counsel's comments that the prosecutors were liars and suborners of

perjury. The defense counsel invited the prosecutor's concomitant attack. In light of the circumstances surrounding the exchange and the substantial evidence against the appellants, we cannot agree that appellants suffered any prejudice. *See United States v. Cotton*, 631 F.2d 63, 66 (5th Cir. 1980) (where defense counsel referred to government agents as liars, and persons engaged in coverups, government entitled to respond to assertions), *cert. denied*, 450 U.S. 1032, 101 S. Ct. 1743, 68 L.Ed.2d 227 (1981).

Appellants also contend that the prosecutor made improper statements by trying to prove guilt by association. We find this contention meritless as the prosecutor properly commented on the evidence presented to the jury when he described the close association that appellants shared with others involved in the kickback scheme prior to and during their criminal activities. *United States v. Tisdale*, 817 F.2d 1552, 1555 (11th Cir.) (stating that when the evidence supports a prosecutor's comments, no error occurs), *cert. denied*, 484 U.S. 868, 108 S. Ct. 194, 98 L.Ed.2d 145 (1987).

VII. Exclusion of Witness Testimony

Appellants contend that reversible error occurred when the district court precluded them from introducing a witness to expose Gelber's self- interest, bias, or motive to testify falsely. It is clear from the record, however, that appellants sought to impeach Gelber's credibility through introducing testimony ***1458** of a convicted drug dealer regarding Gelber's alleged prior bad act of soliciting help to smuggle marijuana.

The district court did not abuse its discretion in excluding this proposed testimony. Specific instances of prior bad acts may not be admitted through extrinsic evidence to

attack a witness's credibility. Fed.R.Evid. 608(b); *see also United States v. Darwin*, 757 F.2d 1193, 1204 (11th Cir. 1985), *cert. denied*, 474 U.S. 1110, 106 S. Ct. 896, 88 L.Ed.2d 930 (1986). Consequently, we find that the district court did not abuse its discretion in excluding this testimony.

CONCLUSION

For the foregoing reasons, we affirm appellants' convictions and sentences.

AFFIRMED.

BARKETT, Circuit Judge, specially concurring:

I concur fully with the majority's opinion affirming the appellants' convictions for mail fraud and bribery and Castro's conspiracy conviction under RICO, and concur in affirming Boehme's, Lechtner's, and Luongo's conspiracy convictions but for different reasons. With respect to Boehme's, Lechtner's, and Luongo's conspiracy convictions, I do not think the government proffered sufficient evidence to prove the existence of the agreement necessary to prove the single overarching conspiracy charged in the indictment. Instead, the government only proved the existence of multiple independent conspiracies each of which involved one of the defendants. However, because the variance between the allegations contained in the indictment and the proof adduced at trial did not affect defendants' substantial rights, I would affirm their convictions on the RICO conspiracy charge.

To convict a defendant for conspiracy in violation of RICO, the defendant must (1) have been associated with (2) an

enterprise engaged in interstate commerce, and (3) must have conducted or participated in the conduct of the enterprise's affairs (4) through a pattern of racketeering. See 18 U.S.C. § 1962(c); *see also United States v. Bright*, 630 F.2d 804, 829 (5th Cir. 1980).[1] To prove the existence of a single overarching conspiracy, rather than multiple independent conspiracies, the government must show that the conspirators agreed to an overall objective. *United States v. Sutherland*, 656 F.2d 1181, 1192-93 (5th Cir. 1981) (as in any other conspiracy, under RICO the government must prove the existence of an "agreement on an overall objective"); see also *United States v. Valera*, 845 F.2d 923, 929 (11th Cir. 1988). Under RICO, the government need not show that the conspirators agreed to commit specific crimes or accomplish common goals; it is enough that they each agreed to participate in a conspiracy to commit the substantive RICO offense of affecting, directly or indirectly, the affairs of the enterprise through a pattern of racketeering. *Sutherland*, 656 F.2d at 1192. Sutherland warns, however, that it is not enough that the defendants were simply participating in the conduct of the same enterprise, or had knowledge of other criminal activity; the gravamen of a RICO conspiracy, like any other conspiracy, is that the defendant not only knows about the conspiracy, but also agrees to participate in it to accomplish an overall objective.[2] Id. at 1192-93; see

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[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11thCir. 1981) (en banc), this circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[2] It's worth noting that Congress's express purpose in enacting the Organized Crime Control Act of 1970, of which RICO is a part, was "to seek the eradication of *organized* crime . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal

also Valera, 845 F.2d at 929.

To show that a defendant agreed with others to participate in the affairs of the enterprise through a pattern of racketeering, the government must prove either (1) an explicit agreement, or (2) in the absence of ***1459** direct evidence, that the nature of the conspiracy is such that the defendant must necessarily have known that others also were conspiring to participate in the same enterprise through a pattern of racketeering activity. ,*Valera* 811111145 F.2d at 929; *Sutherland*, 656 F.2d at 1194. Under (2), an agreement to participate in a single conspiracy can be inferred because the participation of others is necessary for the defendant to benefit from his own criminal activity. Thus, for example, an agreement can be proved circumstantially when the defendant is a member of an enterprise specifically formed for illegal purposes ("association in fact"), see, e.g., *United States v. Church*, 955 F.2d 688 (11th Cir. 1992); *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978), or is a link in a chain of criminal activity, *see e.g., Valera*, 845 F.2d at 923, because the inherent nature of those conspiracies necessarily involve other participants.

The indictment in this case charged Boehme, Lechtner, and Luongo, attorneys practicing in and associated with the Eleventh Judicial Circuit, with agreeing to participate in the affairs of the Circuit Court of the Eleventh Judicial Circuit, through a pattern of racketeering, to wit, Extortion, Conspiracy

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with the unlawful activities of those engaged in *organized* crime." James F. Holderman, *Reconciling RICO's Conspiracy and "Group" Enterprise Concepts with Traditional Conspiracy Doctrine*, 52 U. Cin. L. Rev. 385, 386-87 (1983) (quoting Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (emphasis added).

to Commit Extortion and Attempt to Commit Extortion, Bribery, Unlawful Compensation or Reward for Official Behavior, Conspiracy to Commit Murder, Mail Fraud, and Laundering of Monetary Instruments, with the object of corruptly utilizing the Circuit Court for personal financial gain. Each was charged with committing at least two predicate acts in furtherance of the conspiracy, namely, on numerous occasions paying kickbacks to judges in exchange for appointments as Special Assistant Public Defenders.

Because the nature of the kickback activities did not necessarily involve anyone other than the attorney and judge to which the kickbacks were paid, the government was required to prove that each of the defendants explicitly agreed to participate in a larger conspiracy--one that involved people outside of the individual kickback deals--to conduct the affairs of the Circuit Court through a pattern of racketeering. At trial the government proffered sufficient evidence to show that each of the charged attorneys was a participant in a conspiracy involving his/herself, Judge Gelber, Judge Davis, and Margaret Ferguson. However, the evidence was insufficient to show that Luongo, Boehme, or Lechtner explicitly agreed to participate in a conspiracy in which others also were corruptly utilizing the Circuit Court through a pattern of racketeering.[3] With respect to Luongo, the government did not present any evidence to suggest he was even aware that there was any other criminal activity afoot in the Circuit Court. Lechtner was advised that

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[3] We review the jury's verdict for sufficiency of the evidence *de novo*, but view the evidence in the light most favorable to the government and determine whether a reasonable factfinder could find guilty beyond a reasonable doubt. See *United States v. Kelly*,. 888 F.2d 732 (11th Cir. 1989).

the payment of kickbacks on court appointments was "something that's being done." Similarly, Boehme was informed that he would be placed on the "preferred list" for court appointments. These statements alone, while possibly establishing knowledge of other criminal activity within the Circuit Court, are insufficient to establish beyond a reasonable doubt that Boehme and Lechtner explicitly agreed to accomplish anything more than the receipt of court appointments for their own monetary gain.[4] Nothing suggests that they were aware of the contours or scope of the conspiracy as charged in the indictment, or that they would be interested in or benefit from the similar activities of others. To the contrary, they were interested only in profiting from their individual, clearly-defined wrongful acts, and neither benefitted from or was dependent upon the larger conspiracy. Although conspirators need not know their fellow conspirators or be aware of all the details of a conspiracy, *United States v. Pepe*, 747 F.2d 632, 659 (11th Cir. 1984), it is equally true that "one who embarks on a criminal venture with a circumscribed outline is not responsible for acts of his co-conspirator which are beyond the goals as the defendant understands them." *Bright*, 630 F.2d at 834 ***1460** n. 52. Therefore, I believe that there was a variance between the single conspiracy charged in the indictment and the multiple conspiracies proved at trial. *See Sutherland*, 656 F.2d at 1194 (finding multiple conspiracies rather than a single conspiracy where indicted co-conspirators were involved in similar schemes to bribe the same public

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[4] Castro actually solicited the participation of new attorneys in Judge Gelber's kickback scheme, and thus a reasonable trier-of-fact could find that Castro agreed to particulate in a conspiracy involving numerous participants to corruptly utilize the Circuit Court.

official, but where there was no agreement among them); *Bright*, 630 F.2d at 834 (same).

Luongo, Boehme, and Lechtner are entitled to a new trial, however, only if they can show that the variance affected their substantial rights. *Sutherland*, 656 F.2d at 1190 n. 6, 1195. In *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L.Ed. 1314 (1935), the Supreme Court held that a variance between a single conspiracy charged in an indictment and multiple conspiracies proved at trial is fatal to a conviction only if it "affects the substantial rights" of the accused. *Id.* at 81, 55 S. Ct. at 630-31. In general, a defendant's substantial rights are not affected merely because other people are not guilty of the same conspiracy in which the defendant was involved. Instead, the primary dangers resulting from a variance between the indictment and proof at trial are (1) the accused will not be able to present an adequate defense because of inadequate notification as to the charges, (2) the jury will transfer guilt among the defendants in a joint trial, and (3) the accused may be prosecuted for the same offense later. *Id.*

In Sutherland, the Fifth Circuit focused on three factors to determine whether a variance has affected an accused's substantial rights. First, the court should look to the number of defendants involved in the joint trial and the number of conspiracies actually proved at trial. *Id.* at 1196. The greater the number of defendants and conspirators, the more complex the case, creating a greater risk of jury confusion and transference of guilt from one defendant to another. Second, the court should examine whether evidence of a co-defendant's guilt, which has no bearing on the defendant's guilt, has been kept separate and distinct from evidence material to the defendant's guilt. *Id.* Third, a court should examine whether the government introduced overwhelming evidence of guilt as

to each defendant, and whether that evidence would have been admissible had separate trials been held. *Id.*

In this case, there were four defendants and the government proved the existence of four similar conspiracies. This case was not so complex as to render it likely that the jury transferred guilt among the defendants. Compare *Berger*, 295 U.S. at 82-83, 55 S. Ct. at 631 (no substantial rights affected where there were four defendants and two distinct conspiracies) with *Kotteakos v. United States*, 328 U.S. 750, 766-69, 66 S. Ct. 1239, 1249-50, 90 L.Ed. 1557 (1946) (substantial rights affected where there were thirty-two defendants and eight distinct conspiracies). Second, evidence as to each defendant's role in the kickback schemes was distinct enough so that the jury was unlikely to use evidence of one defendant's guilt against another defendant. Although the similarities between each of the defendant's activities may have made an assertion of innocence more difficult for the jury to believe, I find that the evidence as to the underlying crimes was sufficiently distinct and separate for the jury to consider each defendant's guilt independently. Similarly, the evidence as to each defendant's involvement in the kickback activities was more than sufficient to find them guilty of the individual conspiracies.

In sum, although I believe that a variance existed between the single conspiracy charged in the indictment and the multiple conspiracies proved at trial, the appellants' substantial rights were not affected, and thus reversal is not required. Therefore, I would affirm their convictions on all counts.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4338.

UNITED STATES of America, Plaintiff-Appellee,
v.
William CASTRO, Arthur Luongo, Nancy Lechtner, Harry Boehme, Defendants-
Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

Before HATCHETT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by the Appellants, William Castro and Nancy Lechtner is DENIED.

The petition(s) for rehearing filed by the Appellant, Arthur Luongo is DENIED.

ENTERED FOR THE COURT:
Joseph W. Hatchett
United States Circuit Judge
Filed: September 30, 1996

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4338.

UNITED STATES of America, Plaintiff-Appellee,
v.
William CASTRO, Arthur Luongo, Nancy Lechtner, Harry Boehme, Defendants-
Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before HATCHETT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
Joseph W. Hatchett
United States Circuit Judge
Filed: September 30, 1996